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Restitution

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19. RESTITUTION

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Introduction

19.1 In contrast to 2002, which was an exceptionally bountiful year for the law of restitution in Singapore, 2003 has seen far fewer cases in this subject area. One important case, *Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd* [2003] 2 SLR 103, was decided in early 2003 and has been noted in (2002) 3 SAL Ann Rev at paras 19.67 to 19.79 in view of its significance in relation to other cases noted for the year 2002, including the judgment from which the appeal was heard ([2003] 1 SLR 791). Apart from this case, the law reports and LawNet database reveal only three Supreme Court decisions decided in 2003 which contained any notable discussion on the law of restitution. One dealt with statutory contribution, and in two others, restitutionary claims, which were pleaded in the alternative to contractual claims, failed. The latter two cases provide interesting studies on the relationship between the law of contract and the law of restitution.

Quantum meruit

19.2 A restitutionary claim was rejected in *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR 202. The plaintiff, G, had offered to broker a deal for the sale of Swissotel Holding AG ("Swissotel") to the defendants, R. G's proposal for one per cent of the transaction price as broker's commission, due upon the acquisition of Swissotel by R, was not accepted by R. Pursuant to R's request for more information on the scope of brokerage services to be provided and the indicative price for Swissotel, G sent R some publicly available information on Swissotel and its subsidiary. G also arranged one meeting between representatives of R and those of the owners of Swissotel. Subsequently, Swissotel was put up for sale by its owners under competitive tender, and R managed to acquire Swissotel in that way. G then demanded his commission from R. R disputed G's entitlement, and offered instead an *ex gratia* "introduction fee". G refused to accept it, and instituted legal proceedings.

Contractual and restitutionary quantum meruit

19.3 It appeared from the judgment that G's arguments were two-fold. First, G had argued that he was entitled to a one per cent commission as a matter of contract. Secondly, and in the alternative, G had argued that he was entitled to claim a reasonable sum for services rendered (*quantum meruit*) in restitution. Both claims were dismissed by Tan Lee Meng J. The judge found that, on the facts, no brokerage contract had been formed, and that, in any event, even if there had been a binding contract, the commission was only payable if G had succeeded in brokering a private sale of Swissotel to R, but the sale was in fact concluded through the competitive bidding process. There was a dispute as to what had transpired at the initial meeting arranged by G, but the court found as a fact that there was no discussion of the sale of Swissotel.

19.4 What is of greater interest for the purpose of this chapter of the annual review is the judge's dismissal of the claim for *quantum meruit*. Taking the cue from the Court of Appeal in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 4 SLR 559, the judge approached the claim on two hypotheses: first, that it was contractual, and second,, that it was restitutionary. The earlier Court of Appeal decision had identified that a claim for *quantum meruit* can be based on two legal theories. Firstly, there may be a contractual agreement to provide services for remuneration which failed to provide for details of the rate of payment or even for the work to be done. In such a case, the analysis follows contractual doctrines. Secondly, a *quantum meruit* claim may not be founded on a contract, but may be based on restitutionary principles.

19.5 On the contractual *quantum meruit* claim, Tan J held that even if there had been a contract, the terms provided that the commission was due only if G had succeeded in brokering the sale of Swissotel to R, and this had not been proven to be the case. The court will not imply a promise to pay reasonable remuneration otherwise, in the face of express terms in the contract.

19.6 Tan J then dismissed the restitutionary *quantum meruit* claim, made on the basis that there was no contractual basis for the claim, for two reasons. Firstly, the services rendered were not of a kind that merited remuneration. The judge found that the information G had sent to R was in the public domain, that the sale was not discussed at the meeting which G had arranged between the parties, and that G could not respond to R's query of an indicative sale price. Secondly, and more importantly, the judge held that G's claim for reasonable expenses ran counter to the clear understanding that the

parties had from the beginning that any remuneration for brokerage services was on the basis of success in procuring the sale.

Benefit

19.7 On the findings of fact, this was a fairly obvious case where there was no benefit to the defendant, so it was unsurprising that there was no discussion of the test of benefit used. There has been much academic debate on, but little judicial attention paid to, the question of what constitutes benefit, especially in regard to services, in the law of restitution. A recent interesting judicial discussion of this question is found in *McDonald v Coys of Kensington* [2004] EWCA Civ 47 at [26]–[40]. On the facts of the case before Tan J, the services rendered could not be shown to have any realised or realisable economic value (thus, no "incontrovertible benefit"). Further, there had been nothing on the findings of facts to indicate either that R had sought out or requested the services of G or had "freely accepted" the benefit, *ie*, the acceptance of services knowing that the services were not provided for free, and having the option to accept or reject the services. An interesting contrast may be provided by the Australian case of *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577, where a financial consultant, who had approached the defendants to offer to manage a merger between two companies, succeeded in a claim for restitutionary *quantum meruit* after providing some services in circumstances where no contract for fees had actually been formed. There, the consultant had done much more work, and much of it at the request of the defendants. Consequently, Warren J of the Supreme Court of Victoria found that the defendants had freely accepted the benefits conferred by the consultant.

Risk assumption

19.8 The second and more significant reason for rejecting the restitutionary claim for *quantum meruit* was that it was inconsistent with the understanding of the parties of the nature of the proposed brokerage arrangement. The basis of the claim for restitutionary *quantum meruit* in respect of services rendered in anticipation of a contract that failed to materialise is the subject of much academic debate. It has been variously argued to be based on failure of consideration, free acceptance (as in the *Andrew Shelton* case, *supra*), estoppel, or some idea of good faith in bargaining. Free acceptance as a ground of restitution remains hotly debated among academics but there is some judicial support in English, and especially in Australian, authorities. Whatever may be the basis, the reasoning of the court in the present case appears to be unassailable. If parties to pre-contractual negotiations had clearly understood that the risk of wasted expenditure was to be borne by the plaintiff, then it is just that the law of

restitution should not disturb that allocation of risk. The risk allocation is non-contractual, no doubt, but respect for risk allocation by the parties is latent within the law of restitution. The importance of risk assumption in the law of restitution received ventilation in *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 (noted in (2002) 3 SAL Ann Rev at paras 19.61–19.63). On the facts, it could be said that any claims based on failure of consideration, estoppel or free acceptance, could not succeed when the risk of the failure of the consideration was clearly understood by both parties to be borne by the plaintiff. The English authorities (a recent summary of which can be found in *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324) indicate that whatever may be the basis of the claim, if it is clear that the risk is assumed by the plaintiff, the restitutionary claim cannot succeed.

Failure of consideration

19.9 In *Ngee Ann Development Pte Ltd v Nova Leisure Pte Ltd* [2003] SGHC 168, the plaintiffs had leased a number of units in Ngee Ann City Building to the defendants. The relevant lease was executed on 2 September 1999, and was for a period of five years. A term in the lease provided that the defendants were entitled to a total of six rent-free months, two for each year for the first three years. The lease also provided for termination before the end of the five-year period, by either party giving six months' notice. However, if the tenants were to give notice of termination, they had to pay the landlords half of the rent otherwise payable during the rent-free periods prior to the giving of the notice. After some negotiations, the parties signed a "surrender agreement" on 28 February 2002, under which agreement the tenants surrendered the lease with effect from that date. This agreement provided that the surrender was without prejudice to their obligations and undertakings under the provisions of the lease prior to that date and which remained unperformed.

19.10 The plaintiffs sued the defendants for the six months' rent (nearly $1.5m) otherwise payable under the rent-free period in the lease, on the basis that the rent-free occupation had been given to the defendants on the condition that the defendants did not terminate the five-year lease before its expiry through effluxion of time. Only two arguments were seriously pressed before the court. The first was a contractual one. The plaintiffs argued that as a matter of construction of the contract of lease, the rent-free period was conditional upon the defendant staying as a tenant for the five-year period. Choo Han Teck J disagreed with the submission, and held that on a plain reading of the contract, the rent-free period was not conditional upon the lease expiring only by effluxion of time. The judge pointed out that if the plaintiffs' submission was correct, then it would have made more sense for the

defendants to give notice of termination and pay half the sum than to negotiate for a surrender only to pay the whole of the sum of six months' rental. Further, the surrender agreement contained no provision as to the payment of the rent; although it preserved prior obligations, there was no obligation to pay under the lease.

19.11 In the alternative, counsel for the plaintiffs argued that the plaintiffs were entitled to the rent on the basis that the defendants would otherwise have been unjustly enriched at the expense of the plaintiffs. This submission was also rejected by the court. The parties had regulated their position by contract, and if the parties had not made any provision as to the payment of the rent during the rent-free period in their surrender agreement, the court would not intervene to address the point on their behalf.

Contractual and non-contractual conditions

19.12 On the findings of fact, although it was not clear what the basis of the restitutionary claim was, it would appear that a claim based on failure of consideration could not have succeeded. In a situation where the parties have negotiated their respective positions, once it is accepted that there was no contractual condition to the conferment of the benefit of the six months' free rental apart from the event of termination by the defendants, it is difficult to see how one can resurrect the very same condition as a non-contractual one to justify a restitutionary recovery. There are two reasons for this difficulty. The first difficulty is an evidential one. It is simply not reasonable to infer a factual condition of the conferment (which condition probably also needs to be accepted by the recipient of the benefit) which runs contrary to the written agreement between the parties in respect of the conferment of that same benefit. The second difficulty is related to risk-allocation. In essence, this is another example of risk allocation by the parties, this time clearly by contract, which the judge found no reason to disturb. The surrender agreement, in the view of the judge, had effectively preserved the risk allocation in the lease agreement.

Contribution among tortfeasors

19.13 The common law did not allow a claim for contribution by one tortfeasor against another in respect of the same harm done to the victim, even though one tortfeasor could end up being unjustly enriched at the expense of the other, in the saving of the expense of discharging an obligation to pay damages to the victim, if the victim of the tort chose to proceed only against one of them. Although the common law had elsewhere recognised a right of contribution where both parties were liable on the same debt and one party had discharged it, and equity extended the rules in this respect and also

allowed contribution between co-trustees acting in breach of trust, the reluctance to extend this reasoning to tortfeasors appears to stem from a judicial discomfort with allowing one wrongdoer to proceed against another in respect of the wrongdoing. Under English and Singapore law, such contribution claims can be made, if at all, only upon statutory authority. The position in Singapore today is governed by the Civil Law Act (Cap 43, 1999 Rev Ed), ss 15 and 16.

19.14 The predecessor to these current provisions, Civil Law Act (Cap 43, 1994 Rev Ed) ("the Act"), s 11, was considered in *Nganthavee Teriya v Ang Yee Lim Lawrence* [2003] 2 SLR 361, as the present provisions did not apply retrospectively to the facts of the case, the relevant right to contribution having allegedly accrued before 1 January 1999.

19.15 The plaintiff and her husband, as well as the three defendants, were all shareholders and directors of two Singapore companies. The plaintiff alleged that the defendants had, by a series of wrongs including misrepresentation, breach of contract and fiduciary duties and conspiracy, caused the shares of herself and her husband in the two companies to be diluted, and induced both of them to sell their shares at an undervalue. The plaintiff's husband had also separately commenced proceedings against the same defendants on the same bases. In the plaintiff's action, two of the defendants applied to join her husband to the action, in order to claim contribution from him as a joint tortfeasor in respect the damages claimed by the plaintiff against them.

19.16 The husband applied to strike out the claim against him in the third party application as disclosing no cause of action. The defendants' application was struck out by the Registrar, and the decision was upheld upon appeal to the High Court by Judith Prakash J. The judge found many problems with the defendants' statement of claim against the husband and the proposed amendments thereto. However, this review will only note the contribution claim itself.

Statutory contribution

19.17 Prakash J noted that the contribution claim was entirely statutory. Though initially understandably perturbed by the claim by one alleged wrongdoer to claim contribution from another, the judge was persuaded by the arguments in *K v P* [1993] Ch 140, dealing with the then English provision which was *in pari materia* with the provision under consideration, that Parliament had intended to override the common law defence of *ex turpi causa non oritur actio*. Thus, the judge held that she was precluded by the language of the legislation from disallowing the third party claim only on the

basis that the defendants were asking for relief against damages that they had to pay to the plaintiff because they were found liable to her in conspiracy and they and her husband were co-conspirators in causing harm to the plaintiff. The defendants had a statutory right to contribution against the husband so long as they could establish that they were all joint tortfeasors and the damage suffered by the plaintiff was the result of that tort, even if the tort was also a crime.

Unjust retention of gains

19.18 However, under s 11(2) of the Act, the court had to determine the quantum of the contribution according to what was just and equitable, having regard to the extent of the contributor's responsibility for the damage, and the court had the power to exempt any person from liability to make contribution altogether. The judge noted that on the facts, the husband had not received any benefit from the alleged conspiracy, but that the benefits of the alleged conspiracy had accrued to the defendants. As a result, the effect of allowing the two defendants' contribution claim would be to permit them to retain their ill-gotten gains. The judge (at [18]) considered it as a matter of law that:

> [W]here a plaintiff succeeds in recovering from one tortfeasor the benefits he has derived from a deliberate tort committed against the plaintiff, that tortfeasor would or should not be able to get a contribution from a co-tortfeasor such that he is enabled to retain part of his wrongfully acquired benefit.

The court therefore exercised its powers under s 11(2) of the Act to exempt the husband from liability to make any contribution at all to the damages for which the two defendants might be liable to the plaintiff.

19.19 The present decision was in respect of provisions that are no longer in force. However, the reasoning is likely to be of highly persuasive value in the interpretation of the current ss 15 and 16, because although the provisions have now cast the net wider to provide for contribution claims in more situations, the essence of the former s 11(2) is retained in the current s 16.

19.20 The denial of the contribution claim could leave a benefit in the hands of the plaintiff's husband, in the sense that he would be saved the expense of having to pay on the obligation as a tortfeasor (assuming, of course, that the claim is made out). But the court is entitled to and is right to consider the effect of contribution on the distribution of the net gains among the joint tortfeasors. If A and B jointly and wrongfully (with equal blameworthiness) cause damage of $50,000 to C, and C has sued A, then it is generally just and equitable that A and B should be treated equally and each should shoulder half the burden of the damages ultimately owing to C. The effect of contribution leaves them each with the benefit of a saving of $25,000.

But if in the same circumstances, the harm done to C results in a gain of $50,000 to A and nothing to B, then the same contribution order would leave both parties each with the benefit of the saving of $25,000 but A with the additional gain of $50,000 from the wrong. On the approach of Prakash J, however, B would have no outstanding liability to A, and A would have to cough up the $50,000. This is not tantamount to absolving B from blame because B could still be sued by C if, for example, A turns out to be insolvent. In principle, in order to achieve the same objective, it should follow that if C had sued B instead of A, B could ask for contribution of $50,000 from A. Further, it is difficult to see what difference it would make in either situation if A had spent the $50,000; he had still been enriched, and would generally not be in a position to plead any *bona fide* change of position. This is not the division of the spoils of wrongdoing as such, but the exercise of the discretion inherent in the statutory contribution rules to give effect to the principle to prevent a tortfeasor from benefiting from the wrong.